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Attorneys for Plaintiff

**IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

MARK C. BOON,	)	Case No. 3:12-cv-03081-H-WMC
	)	
Plaintiff,	)	<b>DECLARATION OF PATRIC</b>
	)	<b>LESTER</b>
vs.	)	
	)	DATE: APRIL 14, 2014
PROFESSIONAL COLLECTION	)	TIME: 10:30 A.M.
CONSULTANTS,	)	COURTROOM 15A
	)	
Defendant.	)	HONORABLE MARILYN L. HUFF

I, Patric A. Lester declare and state as follows:

1. I am an attorney at law duly licensed to practice before the courts of the State of California and admitted to practice in the United States District Court the Southern District of California. I am co-counsel and attorney of record for the plaintiff Mark C. Boon ("Boon").

2. The facts set forth herein are known to me personally and if called upon to testify I could and would be competent to testify thereto.

3. In the state court action, defendant Professional Collection Consultants ("PCC") provided its response to the Bill of Particulars which showed only 'credit card statements' from Chase. No documents were ever produced showing the ownership of the account such as an assignment of the account to PCC.

4. PCC, without explanation, dismissed the State Court Action ("SCA")

1 without prejudice, shortly before the trial date for that matter.

2 5. PCC paid, without protest, the Judgment for costs entered in favor of Boon.

3 6. At no time prior to the filing of the Third Amended Complaint (Doc. No.  
4 24, *TAC.*) did PCC proffer any evidence that it was lawfully assigned the account  
5 through any chain of sale, until the time it filed its Motion To Dismiss Third Amended  
6 Complaint Or In The Alternative For Summary Judgment (Doc. No. 26.)

7 7. Only at that time did PCC address the chain of assignment that purports to  
8 legitimize its ownership and/or assignment under any Purchase Agreement.

9 8. PCC still has not produced any 'contract' between Chase and Boon  
10 representing a credit card agreement that was subject to assignment to PCC by whatever  
11 chain of transfer of assignments it has presented.

12 9. At the time of filing of the TAC, I had not had an opportunity to conduct  
13 discovery from PCC or its owner and attorney, Clark Garen.

14 10. No discovery was yet permitted at this point in the litigation under  
15 Fed.R.Civ.P. 26(d) as the parties had not conferred and no discovery plan had been  
16 issued under Fed.R.Civ.P. 26(f). While the Fed.R.Civ.P. 26 conference had not yet  
17 occurred, three separate motions to dismiss and responses as well as amended  
18 complaints had been filed, argued and decided and therefore, the litigation had been  
19 ongoing for eleven months.

20 11. As a result I could not at that stage in the proceeding request through  
21 discovery factual statements and documentary evidence or depose and testing the basis  
22 for the declarants' foundation of the documents presented in the motion for summary  
23 judgment.

24 12. I requested additional time to conduct discovery in plaintiff's points and  
25 authorities opposing defendant's motion to dismiss/summary judgment (Doc. No. 30-1)

26 13. I was confident that once we were able to conduct discovery, we could  
27 attack the sufficiency of defendant's documentation, rebut the declarations and the  
28 evidence and present a genuine issue of material fact.

1           14. After the Court granted its Motion for Summary Judgment, the defendant's  
2 counsel filed his Declaration (Doc. No. 38-2) that allegedly summarized several  
3 conversations we had about the theories of the case. This self-serving declaration does  
4 not accurately reflect the substance of the conversations.

5           15. My present recollection of those conversations is that there were several,  
6 possibly as many as five, separate conversations spanning several months beginning at a  
7 hearing in the other case referred to in Mr. Garen's declaration on PCC's unsuccessful  
8 motion to dismiss, and resuming several times throughout the initial part of this case. At  
9 all times, the conversations were nothing more theoretical discussions of possible paths  
10 by which cases could be brought before the appropriate court in the appropriate posture  
11 on the issue of the Delaware statute of limitations application in a choice of law setting  
12 as arises frequently in Chase credit card debt buyer cases. Among our discussions were  
13 the possibility of taking it to the California Supreme Court as it was a state law question  
14 and the difficulty of getting a controversy in front of that body. We had several pleasant,  
15 academically interesting, discussions in person and by phone speculating how that might  
16 be done. The difference between the other case discussed by Mr. Garen and the instant  
17 one was abusive phone calls which I had no basis for asserting in this case. Perhaps that  
18 is where Mr. Clark constructed the idea that the final complaint would be limited to  
19 violations of the statute of limitations.

20           16. The additional allegations in the TAC were based on reasonable inferences  
21 from the dearth of evidence in the state court action of the existence of a written account  
22 stated and book account between Chase and Boon, PCC's assigned right to that account  
23 and the interest and fees it requested in the state court action.

24           17. While I had little direct evidence there was significant evidence from other  
25 debt buyer cases in which the debt buyer almost never choose to or were able to produce  
26 the necessary evidence and dismissed their cases or went to trial without ever obtaining  
27 the evidence. In over 150 debt buying cases I have represented defendants; in only two  
28 did the debt buyer obtain the necessary admissible evidence to make its case. While

1 admittedly anecdotal, this did provide me with the plausible inference that from a  
2 probability stand point, PCC could not produce admissible evidence either when it filed  
3 or as it litigated its state court action. The failure to produce anything but billing  
4 statements from Chase with nothing more only made that inference stronger.

5 18. Chase has had a well publicized problem with its records and is known to  
6 limit in its purchase and sale agreements<sup>1</sup>, its time period for obtaining and the number  
7 of documents, such as credit card agreements, it makes available it debt buyer purchases,  
8 as well as the authentication of its records. (*See*, Dalié Jiménez, *Dirty Debts Sold Dirt*  
9 *Cheap*, U.Conn L. Rev., (March 2014) and Peter Holland, *One Hundred Billion Dollar*  
10 *Problem*, Journal of Business and Technology Law (2011) p.259.) When viewed against  
11 the backdrop of the debt buying industry and the studies and findings including those  
12 cited in the TAC (Doc. No. 24 ¶7, 17) I expected the probability that PCC would not  
13 have the evidence it needed to try the state court action was very high.

14 19. Without discovery, I could not, and would not have, foreclosed the  
15 possibility of additional violations under the same statute, especially considering how  
16 widespread the practice of filing cases without sufficient admissible evidence is in the  
17 debt buying industry. As previously stated, the Fed.R.Civ.P. 26(f) conference had not  
18 occurred. Therefore, the neither the deadline for amending the complaint nor conducting  
19 discovery had been set.

20 20. To foreclose any other factual basis for recovery before at least some  
21 discovery had been done would not appear wise, ethical or in the best interest of my  
22 client. Therefore, when I was made aware of several opinions that, as of late, had  
23 followed my theory of recovery based on not having or intending to get evidence to  
24 prove case, I added those.

25 21. For PCC to now assert that the TAC was brought in bad faith, by producing  
26 documents which Boon had had no opportunity to request and/or review prior to the  
27

28 <sup>1</sup> Absent from the exhibits provided in support of PCC's Motion to Dismiss (Doc. No. 26-2.)

1 filing of the TAC, nor an opportunity now to assert that those self-same documents fail  
2 to prove that PCC did not violate the statute of limitations when it filed its SCA, is  
3 disingenuous.

4 22. For Clark Garen to attempt to admit into evidence in support of his MFS  
5 (Doc. 38, *Motion for Finding of Bad Faith & Harassment & for Award of Attorney*  
6 *Fees*) one-sided recollections of conversations held over the course of a year prior to the  
7 filing of the TAC is also self-serving and disingenuous.

8 23. In order to zealously prosecute my client's cause of action for violations of  
9 the FDCPA and Rosenthal Act, it was incumbent upon me to bring to light additional  
10 support for the asserted allegations. Failure to do so would have been tantamount to a  
11 failure to zealously represent my client, and an ethical violation.

12 24. At no time during the pendency of this case, nor during the decision-making  
13 process that led to the filing of the TAC did I not consider carefully, and with full weight  
14 and gravity, my obligation to not bring a frivolous suit on behalf of my client and all that  
15 implies.

16 25. At no time was the intention to act in bad faith ever a consideration; rather,  
17 my firm legal judgment was that my client had a legitimate case and I needed to find the  
18 proper pleading language to present my client's allegations to this Court. If we lost, we  
19 lost. If we won, we won, but my client would have – to my best ability – an opportunity  
20 to have his causes of action heard by the proper tribunal. In contrast, PCC opted to  
21 dismiss its SCA without reason or, rather, without apparent reason and pay the  
22 subsequent judgment against it.

23 26. One could say that PCC's SCA was, in fact, brought in bad faith because it  
24 did – with no apparent reason – dismiss the case it filed, after causing Boon to spend  
25 months defending that cause of action, incurring attorney's fees, costs and the concurrent  
26 and consequential emotional stress of being involved in that law suit. The case record in  
27 the SCA shows that PCC was awaiting a response to its settlement demand, and after  
28 apparently having that demand rejected, dismissed its cause of action without prejudice.

1 The dismissal without prejudice further raises the specter of “will they file suit again?  
2 Do I have to do this again?” Perpetual worry and distress; if they filed suit outside the  
3 SOL once, what’s to stop them from assigning it to some other debt collector and suing  
4 again?

5 27. My client had a legitimate cause of action and the dismissal of each attempt  
6 to bring his case to the attention of the court for redress has furthered this distress. For  
7 me to not have continued to try on his behalf would have been far more egregious to my  
8 way of thinking. Boon still has to face the potential of this matter being brought up  
9 again, in yet another lawsuit, at some future date, as the debt buying community finds  
10 yet another supposed theory of recovery outside the plain and simple collection action  
11 which could be brought by any issuer of credit cards by retaining counsel to collect  
12 charged-off debt outright, rather than selling bad debt portfolios to be collected on  
13 outside the statute of limitations.

14 28. The defendant was intent on moving to dismiss a case that had several  
15 plausible factual bases for recovery, which had not been plead as the potential recovery  
16 to the plaintiff would not be increased and would simply complicate a fairly straight  
17 forward case. Additionally, there was a non-frivolous argument for extending the  
18 existing law which was warranted by the addition of several new cases buttressing and  
19 expanding existing case law. These cases included *Hinten v Midland*, 2013 WL 5739035  
20 (E.D. Mo. 2013) (Oct. 10, 2013) which was decided prior to the filing of the TAC, but  
21 after the filing of the Second Amended Complaint (Doc. No. 18.) It was my duty in the  
22 face of the above to add more factual and legal bases to the complaint.

23 I declare under penalty of perjury that the foregoing is true and accurate to the  
24 best of my knowledge.

25  
26 Dated March 28, 2014

Lester & Associates  
By: /s/ Patric A. Lester  
Patric A. Lester  
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Mark C. Boon  
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